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INTERNATIONAL COMMERCIAL MEDIATION AND THE DEVELOPMENT OF THE RIGHT OF ACCESS TO JUSTICE

Abstract

Access to justice is a fundamental and constitutional right and concept in most modern legal systems. This right is seen as a safeguard of peace and prosperity in societies through the insurance of the respect of the rule of law and rights by defined structures and institutions. Although the prevailing interpretation of this right is closely linked to the judicial system, there seem to be some developments toward integrating other tools and the emergence of a complex institutional and regulatory justice system. The case of international business disputes appears to be worthy of study as it reflects the specific needs and requirements for customized access to justice in this field. This paper will try to explore this movement and shift in paradigms, focusing on the potential influence of some mechanisms such as mediation, on the classic understanding of access to justice.

Key Words: *Justice, International Business, Mediation, Development, Interactions*

Introduction

International commercial disputes are on the rise as a result of globalization and expanding economic integration projects. Resolving these disputes would contribute to the growth of international commercial transactions and ensure sustainable development in general. In this context, businesses seem to have many options to resolve disputes, such as cross-border litigation and alternative dispute resolution mechanisms. From a legal perspective, ensuring access to justice is highly connected to the role of adjudicative mechanisms, especially courts that are considered as safeguards for respect of the rule of law. Nevertheless, the failure of adjudicative methods to deliver efficient solutions and the unique requirements of international business transactions might have some influence on the understanding mentioned. Some of the previous research already highlighted this idea, however, it was more general and related to both civil and commercial disputes, where there seems to be a movement towards the expansion and modernization of the right of access to justice to include and cover Alternative Dispute Resolution (ADR) mechanisms as well.[1]

[1] Carlos Esplugues, "Civil and Commercial Mediation and National Courts: Towards a New Concept of Justice for the XXI Century?," in *General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Comparé. Ius Comparatum - Global Studies in Comparative Law,* ed. M. Schauer and B. Verschraegen (Springer, 2017), 213-259, https://doi.org/10.1007/978-94-024-1066-2_10

These remarks are not merely a theoretical debate among scholars, but are also reflected in the integration of ADR regulations into procedural legal instruments that are typically related only to the judicial system. This is the case in France and Belgium, for instance, where the French Code of Civil Procedure (CCP) and the Belgian Judicial Code (BJC) now have provisions related to mediation as a process that is part of the justice system.[2]

These formal indicators reflect a growing recognition and support for alternative mechanisms as a potential remedy for issues faced in classic litigations. Mediation as one of the ADRs might be defined as an alternative non-adjudicative process of dispute resolution. Put simply, it consists of the efforts of a neutral third party (mediator), whose main role is to assist parties to reach a settlement agreement that will end their dispute entirely or partially.

Going back to the international business context, it is fair to mention that experts also highlighted that the international dispute resolution scene is increasingly evolving and expanding toward more "holistic" approaches, and mediation as an ADR is believed to play an important role in ensuring this shift.[3]

Therefore, it seems worthy of attention to conduct a detailed analysis of this expansion in the international business field and to consider the regulatory developments and institutional environment of international mediation.

This paper builds on previous contributions to elaborate and elucidate this movement and its influence on the right of access to justice. As a starting point, it tackles the features of the classic and common understanding of access to justice (1) then it explains how the nature of international business disputes and transactions might recall a need for customization of the mentioned understanding (2) before examining the complex nature of the emerging international commercial justice system and how mediation might contribute to its structure and functioning (3)

To achieve these objectives, the paper adopts a descriptive, analytical, and comparative legal research approach. The main focus will be on international and regional legal instruments connected to the regulation of international dispute resolution and mediation.

Classic understanding of the right of access to justice

Ideally, access to justice could be a very wide term that includes any technique or legal path that allows individuals and businesses to get fair and just solutions to their legal disputes and issues. This would include recourse to State judicial bodies, such as courts, and other mechanisms that are seen as alternatives or sometimes considered "private," such as arbitration, mediation, or conciliation.

Nevertheless, in practice, there is a preference for connecting this right to certain dispute resolution mechanisms, such as courts or adjudicative methods only.[4] Experts believe that the monopoly of the State and its judicial system might be explained by some major historical events

[2] Marco Giacalone and Sajedeh Salehi, "An Empirical Study on Mediation in Civil and Commercial Disputes in Europe: The Mediation Service Providers Perspective," *Revista Ítalo-española De Derecho Procesal,* no. 2 (2022): 20-26, https://doi.org/10.37417/rivitsproc/802 in France, contractual mediation was regulated in articles 1530-1535, while judicial mediation was subject to articles 131-1 to 131-15. In Belgium, Mediation is regulated in Articles 1724-1737.

[3] Katia Fach Gómez, "The role of mediation in international commercial disputes," in *Mediation in international commercial and investment disputes,* ed. C. Titi and K. F. Gómez (Oxford University Press, 2019), 2-3 http://dx.doi.org/10.2139/ssrn.3418648

[4] Silvia Barona and Carlos Esplugues, "ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends," in Global Perspectives on ADR ed. C. Esplugues and S. Barona (Intersentia, 2014), 1-3 http://dx.doi.org/10.2139/ssrn.2403142

such as the French Revolution, which strengthened the idea of the "single source of power".[5] Put simply, parliaments and judges are seen as representing the "will of the population" when adopting or applying the rule of law, and thus, the judicial system as a type of continuity of States is worth being in a superior position in the hierarchy of powers.[6] History also proves a significant development and expansion in the power given to States in the justice field, which resulted in considering State courts and civil procedures as the preferred solution for any potential dispute.[7]

This preference was also enshrined in many international and national legal instruments. For instance, we might mention Article 8 of the Universal Declaration of Human Rights (UDHR) which stipulates that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.", Article 14 of the International Covenant on Civil and Political Rights (ICCPR) providing that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.", or Article 6 of the European Charter of Human rights (ECHR) related to the right to a fair trial which stipulates that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." These legal texts and many other regional and national texts usually connect the idea of achieving justice to State tribunals and courts without mentioning other alternatives to the judicial system.

In the best scenarios, the nature of some disputes (labor, commercial, etc.) led to the creation of the so-called judicial specialization as one of the solutions to enhance the quality and efficiency of the judicial system and the right of access to justice.[8] This approach, however, confirms this centralization around the judicial body, as even solutions are still inside the same system and paradigms.

This logic and centralization around the judicial system seems to be expanding beyond domestic disputes to touch international business disputes and attempt to solve some issues faced in international arbitration. This is clear from the movement to establish some institutions or more precisely divisions of existing ones such as international commercial courts (e.g. Singapore International Commercial Court) and international investment courts (the example of investment court systems established by the EU and its partners under some Free Trade Agreements, e.g. Comprehensive Economic and Trade Agreement EU-CANADA and European Union–Vietnam Free Trade Agreement).[9] The consideration of judicial institutions is not limited to specialized international bodies but even includes domestic courts that are, even when acknowledging the different forms of inadequacies with international business needs and requirements, still considered as "the most important forum" jointly with international arbitration in resolving cross-border commercial disputes.[10] It is also fair to mention that some domestic courts, such as the London Commercial Court model, gained remarkable popularity over others in

[5] Barona and Esplugues, "ADR Mechanisms," 2.

[6] Barona and Esplugues, "ADR Mechanisms," 2.

[7] Barona and Esplugues, "ADR Mechanisms," 2.

[8] Brian Opeskin, "The Relentless Rise of Judicial Specialisation and its Implications for Judicial Systems," Current Legal Problems 75, no. 1 (2022): 1-43, http://dx.doi.org/10.2139/ssrn.4185334

[9] Lucy Reed, "International Dispute Resolution Courts: Retreat Or Advance," McGill Journal of Dispute Resolution 4, (2017): 129-147, https://www.canlii.org/w/canlii/2017CanLIIDocs398.pdf

[10] Firew Tiba, "The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia," Loyola University Chicago International Law Review 14, no. 1 (2016): 38, https://ssrn.com/abstract=2943870

attracting disputants of international business disputes. According to scholars, this could be explained by English judges' level of expertise in commercial matters or their business-friendly legal system.[11] In one way or another, this good reputation of some domestic commercial courts with international influence might be a reason to strengthen the legitimacy of the classic understanding of the right of access to justice.

Some experts go further and suggest that cultural contexts could justify this inclination toward judicial institutions. For example, Western countries, known for having highly developed and independent judicial systems, could support this understanding of access to justice and respect for courts.[12] Other nations and cultures might be more inclined towards consensual dispute resolution methods; thus, their understanding of access to justice could be less adversarial. The Chinese example and the influence of Confucianism on this culture go in the same direction, as litigation was seen as a threat to harmonious and peaceful social relationships.[13]

Nevertheless, it is fair to highlight that the cultural factors mentioned, even when acknowledging their importance in shaping the understanding of the right of access to justice, are not exclusive and may only constitute a portion of a larger picture. The way access to justice is perceived is also highly influenced by the efficiency of the dominant judicial structures; the lower the quality and the responsiveness of courts to the needs and interests of businesses and disputants in general, the higher the chances of a more open and broad interpretation of this concept beyond classic institutions.[14] The interaction between the mentioned variables will be assisted by a movement from lawmakers and business organizations to tailor modern solutions to dispute resolution. This may result in establishing a new, customized justice structure, at least for certain kinds of conflicts.

The need for customized access to justice in the international commercial field

The idea behind this section is to present the context and background that would justify or facilitate the acceptance of a potential development of our understanding of access to justice. Three factors may be examined in this context: the current condition and limits of traditional mechanisms such as litigation; the nature of international business transactions and disputes, which appear to have particular requirements and features; and the unique characteristics of mediation in this field.

Before delving deep into this part, it is fair to clarify that thinking about the customization of the right of access to justice might be considered a debatable topic, subject to a lot of skepticism and uncertainty. Previous research already highlighted this idea and how ADRs were generally considered a threat to the authority of classic, more formal paradigms of delivering justice.[15] ADRs were considered as limiting the role of the judicial body as a safeguard for the respect of the rule of law in society.[16] Mediation, as one of the ADRs and as an alternative dispute resolution process, was heavily criticized by scholars who saw it as a kind of "poor justice to the poor".[17] The process was also seen as a weak alternative that does not provide enough protection to those who want to use it compared to litigation.[18] In

[11] Reed, "International Dispute Resolution," 138.

[12] Reed, "International Dispute Resolution," 134.

[13] Cheng Qian, "The culture of China's mediation in regional and international affairs," Conflict Resolution Quarterly 28, no. 1 (2010): 54-55, https://doi.org/10.1002/crq.20012

[14] Barona and Esplugues, "ADR Mechanisms," 37-38.

[15] Charlie Irvine, "What Do 'Lay' People Know about Justice? An Empirical Enquiry," International Journal of Law in Context 16, no. 2 (2020): 146–164, https://doi.org/10.1017/S1744552320000117.

[16] Irvine, "What Do 'Lay'," 148-149.

[17] Irvine, "What Do 'Lay'," 147.

[18] Irvine, "What Do 'Lay'," 148.

other words, Mediation was considered a social practice that is far from any legal basis or theory behind it as a process or as an outcome. The criticism, in large part, originated from a formalistic and positivist way of thinking that focuses on substantive justice (solutions and outcomes must be based on the legal rights of disputants) rather than other approaches that are used in consensual methods such as problem-solving or interests of disputants.[19] The influence of the strong internal and formal doctrinal approach on the legal industry and research might also explain this situation.

Nevertheless, the crisis and complexity surrounding the functioning of classic institutions,[20], such as the case backlog in front of State courts and the related high costs, paved the way for the introduction of many solutions, such as the integration of mechanisms that were somehow seen as external or different from the known judicial structures.[21]

It is fair to clarify first that diversifying dispute-resolution methods might be seen in domestic and non-commercial disputes as well, for many practical reasons, such as the mentioned backlog in front of most judicial systems in the world and the expected efficiency related to ADR mechanisms in different types of conflicts.

Nonetheless, this paper's focus on international business disputes is not a random selection of a field to examine or study. It could be justified by the fact that they usually involve professionals and businesses assisted by highly experienced legal teams and representatives, and by the structure of ensuring justice in this field, which seems to be subject to many developments and changes. The distinct demands and features of international business may necessitate innovative approaches in this area, apart from those that predominate in domestic and non-commercial disputes.

In most cases, parties and practitioners in cross-border commercial disputes are inclined towards arbitration as an ADR mechanism that is well-surrounded by national and international legal instruments that ensure the certainty and predictability of the process. The preference for arbitration is reflected in most international commercial contracts and investment treaties; in almost 90 % of the former and 93% of the latter, an arbitration clause is included.[22]

The use of arbitration and its popularity raises many questions about the possible unique understanding of access to justice in the international commercial field. Litigation in the international business context poses many issues related to its adequacy with the expectations of different players in this sector. In most cases, litigation tends to be a very lengthy and complex process subject to the principle of public proceedings, which might be incompatible with businesses' expectations for speed, flexibility, and confidentiality. Moreover, the foreign nature of legal systems and possible risks related to applicable rules and regulations would render cross-border litigation even less attractive.

The level of international cooperation concerning the circulation of foreign judgments, if we exclude some regional efforts such as the developed EU Private International Law regulations in this

[19] Irvine, "What Do 'Lay'," 147-148.

[20] For statistics in this context see; ADR Center, The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation (Report, June 9, 2010) https://toolkitcompany.com/data/files/Resource%20center/Research%20and%20surveys/Survey_Data_Report%20cost%20of%20not%20using%20ADR%20EU%202010.pdf; Giuseppe De Palo, Ashley Feasley and Flavia Orecchini, Quantifying the Cost of Not Using Mediation – A Data Analysis (Report, 2011) https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf.

[21] Barona and Esplugues, "ADR Mechanisms," 37-38.

[22] Otto Sandrock, "The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives," American Review of International Arbitration 20, (2009): 37 cited in Stacie Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation," Washington and Lee Law Review 73, no. 4 (2016): 1976, https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1639&context=facpubs

matter,[23], also seems to be very limited, and this could increase uncertainties related to litigation. Additionally, even the different forms of bilateral agreements in the field of judicial cooperation are seen by some experts as insufficient and unable to achieve the same amount of certainty for cross-border enforcement of judgments if compared to regional[24] or multilateral instruments such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.[25]

In the same context as ADRs, mediation also seems to be subject to an increasing number of international efforts that are steadily reducing different uncertainties surrounding this tool.[26] Many of these efforts are trying to put mediation in a similar position to that of other more commonly used alternatives, such as arbitration. These regulatory developments might make the process more qualified to overcome the issues faced in cross-border commercial litigation and contribute to the growth of the emerging comprehensive international dispute resolution system.

Furthermore, the nature of international business transactions seems to have become more complex and sensitive.[27] Thus, as mentioned earlier, most companies prefer to follow the guidance and assistance provided by their legal teams and counsels, including participating in the mediation process and drafting its outcomes. This assistance from legal professionals and regulatory changes could reduce risks related to the informal nature of this mechanism and allow it to be a key element in amending the way in which international commercial justice is perceived.

Another factor to consider is the mediation model used. In general, there are two approaches: facilitative mediation, where the third party's role is limited to facilitating negotiations between parties who are supposed to bring the solution themselves, and evaluative mediation, where the role of the mediator seems to be more active as he expresses views and proposes potential solutions.[28] Some experts highlighted that parties usually expect the mediator to be more evaluative and active in business matters, such as providing recommendations based on the legal merits of the case.[29] Therefore, if we consider that many mediators, especially in international commercial disputes, have the minimum requirements of legal expertise and that business lawyers usually participate in mediation to assist and advise their clients, this might also ensure the quality of the process as a reliable alternative.

These remarks might pave the way for a new approach to ensuring justice in the international commercial field. An approach that is not strictly limited to the role of courts and judges as classic solutions but open to other mechanisms that are not necessarily adjudicative.

[23] Sarolta Szabó, "Brief summary of the evolution of the EU regulation on private international law," Iustum Aequum Salutare 7, no. 2 (2011): 143-151, https://publikacio.ppke.hu/id/eprint/773/1/000679841.pdf

[24] Such as the EU Private International Law framework.

[25] Tiba, "The Emergence of Hybrid," 53.

[26] We will present some of these developments in section 3

[27] Stacie I. Strong, "Beyond international commercial arbitration - the promise of international commercial mediation," Washington University Journal 45, no. 1 (2014): 19-21, https://journals.library.wustl.edu/lawpolicy/article/885/galley/17720/view/

[28] Wesam Faisal Al Shawawreh, "An evaluation study in mediation: a comparative study between Australia and Jordan" (PhD diss., University of Southern Queensland, 2020), 14-26, https://eprints.usq.edu.au/39907/1/Wesam%20Faisal%20Al%20Shawawreh-%20PhD%20Final%20thesis.pdf

[29] Manuela Renata Grosu, "Hybrid Procedures: The Combination of Mediation and Arbitration in Resolving Commercial Disputes from Arbitrator, Mediator, Legal Representative, and Client Perspective," (PhD diss., Eötvös Loránd University, 2021), 43-44, https://edit.elte.hu/xmlui/bitstream/handle/10831/54725/Disszert%C3%A1ci%C3%B3.pdf?sequence=1

Mediation and the complex "ecosystem"[30] of international commercial justice

The analysis of the complexity of this emergent system and the potential contribution of mediation in this context might require three steps. The first is to examine the different developments related to the legal and institutional environment of international business mediation, in particular, and international dispute resolution in general, and how this is reshaping the classic understanding of dispute resolution (section 3.1). The second focuses on the increasing interactions between dispute-resolution mechanisms as one of the main features of the mentioned 'ecosystem', focusing on the role of mediation in strengthening this connection (section 3.2). The third aims to provide some other examples of the way mediation might bring some amendments to procedural rules related to adjudicative methods (section 3.3).

Regulatory and institutional developments as a framework for this ecosystem

In the last two decades, mediation has been subject to a large wave of regulations all around the world.[31] This movement could be a reason for a reassessment of the relationship between mediation as a process and the legal system. Many experts have started to examine this interaction and to extract legal principles behind the functioning of mediation.[32] Other researchers focused on the best techniques to regulate mediation as a process with a unique nature and features.[33] The legal and theoretical attention that mediation has received may lead to taking it more seriously as a complement to the courts as a means of administering justice.[34]

In contrast to previous years, when arbitration was the go-to option for resolving most international business disputes with little to no competition from other ADR processes, it appears that the situation is slowly starting to change. This should not be interpreted as denying the dominance of arbitration in the international dispute resolution scene, but just to highlight that some factors could justify expectations of growth in the use of other mechanisms such as mediation.

The legal element is one of the best examples of the mentioned factors as international business mediation seems to receive different forms of regulation that go from soft-law to hard-law legal rules at national, regional, and international levels. Many regional and international organizations are increasing their efforts to strengthen and harmonize the legal environment of international business mediation. We can mention many initiatives, such as the United Nations Commission on International Trade Law (UNCITRAL) through its different Model Laws related to International Commercial Conciliation/ Mediation (2002/2018) and binding instruments such as the United Nations Convention on International Settlement Agreements Resulting from Mediation known also as the "Singapore

[30] The use of the word "ecosystem" was inspired by the expression "Mediation ecosystem" used previously in Fach Gómez, above n. 3 at 10

[31] Barona and Esplugues, "ADR Mechanisms," 38.

[32] Petra Hietanen-Kunwald, "Mediation and the legal system: Extracting the legal principles of Civil and Commercial Mediation," (PhD diss., Helsinki University, 2018), 10-13, https://helda.helsinki.fi/server/api/core/bitstreams/4ade2ceb-67fc-4de4-8e9c-4793becc70b9/content

[33] Nadja Alexander, "Mediation and the Art of Regulation," QUT Law & Justice Journal 8, (2008): 1-23, http://dx.doi.org/10.2139/ssrn.3747674 ; Nadja Alexander, "Harmonisation and diversity in the private international law of mediation: The rhythms of regulatory reform" in Mediation: Principles and regulation in comparative perspective, ed. K. J. Hopt and F. Steffek (Oxford University Press, 2016) 1-72, http://mediation-moves.eu/wp-content/uploads/2018/06/Alexander_Harmonisation-and-Diversity-in-the-Private-International-Law-of-Mediation-The-Rhythms-of-Regulatory-Reform.pdf

[34] Barona and Esplugues, "ADR Mechanisms," 37-40.

Convention" (2018), the International Center for the Settlement of Investment Disputes (ICSID) and the mediation rules it developed in 2022, the efforts of some business organizations such as the International Chamber of Commerce (ICC) mediation rules and services, other initiatives of regional economic integration organizations such as the EU 2008 Directive on certain aspects of mediation in civil and commercial matters or the 2017 Uniform Act on Mediation (UAM) of the Organization for the Harmonization of Business Law in Africa (OHADA)…

This context might alleviate fears related to the disconnection between mediation and the legal system. In other words, even if mediation does not use the same adversarial and formalistic logic used in courts and arbitration, we can still notice that the process is moving closer toward certainty and predictability, which are considered important factors in international dispute resolution processes. The certainty around international business mediation might be ensured, as mentioned by regulatory and institutional safeguards of assistance and control from other mechanisms and institutions.

Some scholars have already mentioned the movement toward the expansion and establishment of "multi-faceted" dispute resolution systems in the international field.[35] This movement consists of creating a dispute resolution "ecosystem" of different techniques and tools, where there is an undeniable interaction between its components. This would create a comprehensive and complementary system where adjudicative and non-adjudicative methods control and assist each other. Fach Gómez describes these developments as a:

> "systemic evolution of public and private dispute resolution mechanisms towards a non-hierarchical coexistence (which) is also expected to produce effects in terms of the principle of access to justice. This key principle…, is likely to become broader in scope in the future. If it is concluded that access to justice no longer refers solely to access to state court justice but also to nonadjudicative protection mechanisms, many relevant changes are going to occur (e.g., the drafting and judicial interpretation of various international and regional provisions addressing this major issue will need to be modified)."[36]

Many countries, such as the UK, UAE, Qatar, and Singapore, are in the process of establishing or already have concrete models of the mentioned systems to be an international center of dispute resolution for international commercial disputes. For instance, Singapore, a leading country in the field of international commercial dispute resolution, seems to have a comprehensive legal and institutional framework dedicated to international dispute resolution. Singapore established the Singapore International Mediation Center (SIMC), Singapore International Arbitration Center (SIAC), and the Singapore International Commercial Court (SICC), which all serve the goal of transforming the country into a hub for resolving international business disputes.[37]

Mediation seems to be an important element of this dispute resolution system not only because of the dedicated institutions offering mediation in the international business field but also because

[35] Fach Gómez, "The role of mediation," 2.

[36] Fach Gómez, "The role of mediation," 3.

[37] Fach Gómez, "The role of mediation," 2-3.

of its connection to other mechanisms, such as arbitration and litigation.

Mediation's interactions with adjudicative mechanisms as a connecting factor

As previously mentioned, one of the main features of this "ecosystem" for justice in the international commercial field is the interaction between its adjudicative and non-adjudicative mechanisms.[38] Given the nature of the mediation process and its need for support and control[39] from adjudicative mechanisms such as arbitration and litigation, mediation may serve as a connecting element within this complex system.

Assistance-based interactions

When it comes to the interaction of mediation with other ADR forms, such as arbitration, it is obvious that many arbitration laws, institutional rules, and contracts provide for the possibility of hybrid procedures. Put simply, parties can mix mediation with arbitration to benefit from the advantages of both processes. This could be particularly useful in assisting with the weak parts of each process. A popular example in this regard is the issue of enforceability and the incorporation of mediated settlement agreements into consent arbitral awards to benefit from the wide recognition regime provided by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention" (1958).

In the same context, Article 16 of the OHADA Uniform Act on Mediation confirms this practice when it stipulates that

> "… When the agreement arising out of the mediation is reached while arbitral proceedings are ongoing, the parties, or the most diligent party, acting with the express agreement of the other party, may ask the arbitration tribunal constituted to take note of the agreement reached in a consent award. The arbitral tribunal shall decide without debate, unless it deems it necessary to hear the parties."

This would be quite helpful, especially considering that the Singapore Convention on Enforcement is recent in nature and may take some time to obtain more ratifications before it can significantly impact the facilitation of the cross-border enforcement of mediated settlement agreements. This interaction might be examined under the emergence of complex structures for international commercial justice in the 21st century.[40]

The same applies to ties between mediation and courts as a state body, as the interaction between both methods of dispute resolution could take different forms, either assistance or control or both.

Assistance might be recalled in many scenarios where the characteristics of the mediation process are incapable of providing efficient solutions or protective measures for parties' rights.

In this context, Article 14 of the UNCITRAL Model Law on International Commercial Mediation provides that

> "Where the parties have agreed to mediate and have

[38] Barona and Esplugues, "ADR Mechanisms," 39.

[39] Haris Meidanis, "International Mediation and Private International Law," ICC Dispute Resolution Bulletin, no. 1 (2020): 42. Meidanis highlights the importance of the duality of assistance and control from courts in the context of arbitration, which will inspire the author of the current paper to apply it in a broader interpretation when tackling mediation.

[40] Esplugues, "Civil and Commercial Mediation," 213-259.

expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings." This Article shows the assistance that courts and arbitral tribunals might offer to mediation, at least based on two levels. The first is the emphasis on the parties' agreement to mediate and the duty of courts or arbitral tribunals to respect it, or, to put it another way, guarantee their enforcement. It is fair to point out that court support for mediation agreements can range from relatively simple "irrecevabilité" of claims in violation of a mediation agreement, as in the French legal system, to stricter approaches that permit the non-breaching party to even request damages, as in the German and Austrian models.[41] The second level of assistance in Article 14 is reflected in the possibility given to parties to seek interim measures from courts or arbitral tribunals to protect their rights whenever necessary, even if they agree to waive their right to initiate litigation or arbitration procedures during mediation and the fact that this agreement is legally binding.[42] These provisions reflect a recognition, which is enshrined in mediation regulation, of the supportive role of adjudicative methods as an extra safeguard for the mediation process.

Despite being soft law, the model law's wording appears to have an impact on numerous legal systems. OHADA Article 15 of the Uniform Act on Mediation seems to provide an example by stipulating that "The provisions of the previous paragraph shall not apply when a party deems it necessary to initiate, for provisional or conservatory purposes, proceedings to safeguard its rights. The initiation of such proceedings may neither be considered as such, as a waiver to the mediation agreement, nor as terminating the mediation process." This paragraph is interesting as it confirms how the interaction between Mediation and adjudicative methods in general tries to strike a balance between the protection of rights and the respect of mediation as an ADR mechanism. Consequently, the fact that the mediation process's regulatory regime calls for assistance from other mechanisms does not imply that mediation was unsuccessful and has to be terminated; rather, it should be

[41] Meidanis, "International Mediation and Private," 45.

[42] United Nations Commission on International Trade Law, Model Law on International Commercial Conciliation with Guide to Enactment and Use (2002), paras. 94–95, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf.

understood within the context of a broader dispute resolution "ecosystem" in which its elements work in cooperation.[43]

Another example is the enforcement of agreements resulting from the mediation process known also as "settlement agreements" which may require an intervention from courts such as the judicial homologation procedures. Article 6.2 of the EU Mediation Directive goes in this direction when it provides that "The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made."

OHADA, as another regional economic integration organization, seems to recognize this approach and enshrined it in its Uniform Act on Mediation. Article 16 of this legal instrument stipulates that

> "…Upon joint request of the parties, the mediation agreement may be submitted for registration under the notary's registry, with formal recognition of the submissions and signatures. The notary provides, upon request of the relevant party, an engrossment or a copy of the agreement for enforcement. Upon joint request of the parties or, failing this, upon request of the most diligent party, the mediation agreement may also be subject to approval or exequatur by the competent court. The judge shall issue an order. He may not modify the terms of the agreement arising out of the mediation…"

These provisions also reflect the orientation to benefit from other institutions such as the approval of courts or engrossments of notaries.

Assistance could be very useful, especially in the international business context where there is a need for cross-border enforcement and many private international law rules are involved. This is clearly mentioned in some of the EU instruments, such as the EU Mediation Directive, where recital 20 of this legal text highlights the question of benefiting from other Private International Law instruments that are related to the circulation of judgments and not specifically to settlements. Meidanis describes this technique as a scenario where the settlement is "disguised" as another more "common" instrument (such as judgment, authentic instrument or a decision) according to the law of the EU member state where enforcement is sought for the first time and then this new instrument is the one that will be able to be enforced in other Member States.[44]

Control-based interactions

When it comes to control, courts may also provide some extra safeguards in relation to the outcome of the mediation process and its adequacy with what are considered protective measures for the parties involved. The Singapore Convention may provide a legal basis for this remark as even if the purpose of this new legal instrument is to facilitate the circulation of international mediated settlement agreements, some protective measures are still there, such as the case of Article 5 related to the grounds for refusing to grant relief to the settlement agreement. Article 5 provides many safeguards to ensure that the enforcement of the

[43] Fach Gómez, "The role of mediation," 3.

[44] Haris Meidanis, "Enforcement of Mediation Settlement Agreements in the EU and the Need for Reform," Journal of Private International Law 16, no. 2 (2020): 280, https://doi.org/10.1080/17441048.2020.1796226

settlement agreement respects the legal requirements for its validity, the legal capacity of parties to enter into binding agreements, the standards applicable to the mediation process or the mediator, or the public policy of the country where enforcement is sought. This type of control could establish a balance between the mediation's overarching philosophy, which places a strong emphasis on voluntariness and the free will of the parties, and the requirement to preserve public interest and to ensure minimum safeguards.

Control might also be connected to the idea of ensuring the quality of the mediation process. For instance, the 2008 EU Mediation Directive in Article 4 and Recital 16 encourages Member States to adopt appropriate "quality control mechanisms" to guarantee the respect of the mediation principles and its effectiveness as a process. These mechanisms might take different forms, such as accreditation techniques for mediators or codes of conduct.[45] In this context, it is reasonable to imagine also a potential intervention from courts whenever one of the parties challenges the outcome of the mediation process based on its non-respect of these quality standards. Article 6 of the directive also seems to confirm these supervision powers given to courts when linking the possibility of enforcement to the respect of "the law of the Member State where the request is made." The courts will generally decide the actual assessment and interpretation of the degree of compliance of settlements with these national laws and regulations.

Another regional organization that appears to be moving in this direction is OHADA, which also permits courts to have minimum control over the agreements reached through the mediation process. This is confirmed by Article 16 of the OHADA Uniform Act on Mediation, which stipulates that "The competent court shall limit itself to checking the authenticity of the mediation agreement... However, approval or enforcement may be refused if the mediation agreement is contrary to public policy." This Article, even when trying to ensure the need for efficient enforcement of settlements reached through mediation with simplified procedures, still recognizes that judicial protection should be exercised. Thus, courts must ensure that both private and public interests are guaranteed by checking the authenticity of settlements and their conformity with the requirements of public policy. It is also expected that courts, while making this check, will consider the nature of the mediation process, which adds extra safeguards that should be controlled in addition to classic contract law defenses.

Mediation's influence on procedural rules of other adjudicative mechanisms

Mediation influence is not limited to the duality of assistance and control and might also have some implications on procedural rules of other adjudicative proceedings.

An excellent example could be found in the rules of evidence. Article 11 of UNCITRAL's Mediation Model Law states in this regard that

> "1. A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following: (a) An

[45] Jan Tymowski, The Mediation Directive: European Implementation Assessment (Brussels: European Parliamentary Research Service, 2016) 20, https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/593789/EPRS_IDA(2016)593789_EN.pdf

> invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings; (b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute; (c) Statements or admissions made by a party in the course of the mediation proceedings; (d) Proposals made by the mediator;…"

Another legal basis is Article 7 of the 2008 EU mediation directive, which ensures the same safeguard of confidentiality by stipulating that

> "1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process…"

These rules are supposed to protect one of the most important features of the process: its confidentiality. Confidentiality seems to be an appealing feature of mediation and ADRs in general because of its vital role in ensuring the interests of commercial disputants and its ability to protect the reputation of businesses, which is a very sensitive issue, especially for large companies. Going back to the main focus of this paper, the rules of evidence are without a doubt one of the key features of the way how justice is ensured through litigation or arbitration, and allowing mediation to make adjustments to these rules might be interpreted as a recognition of the impact of ADRs on the classic understanding of access to justice.

Moreover, even if the mediation regulatory framework is contributing to the development of the right of access to justice towards expansion, it still acknowledges that recourse to State courts must be ensured in case of termination of mediation without reaching a settlement agreement. This is the case of limitation periods, the time specified by law to start a legal action, as many mediation rules insist on the importance of suspending these timeframes to guarantee that parties always have their right to litigate the matter subject to dispute. UNCITRAL Model Law on International Commercial Mediation in its 4th footnotes suggests the following provision

> "1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended. 2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement."

Article 8 of the EU Mediation Directive also ensures this safeguard by providing that

> "1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process. 2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party."

Even if this type of extension of the prescription periods aims to protect parties' right to access to state courts, it could also have a positive impact on the level of engagement and participation of parties in the mediation process if they are certain that their time in mediation will not put them in a disadvantaged legal and procedural situation. In all cases and with the different justifications, the impact of mediation on the timeframes and procedural rules of the judicial system seems to be present.

These are just a few examples of potential interactions between adjudicative and non-adjudicative techniques. Nevertheless, they might be the starting point for more research in the complex nature of access to justice in the international commercial field.

It is fair to emphasize that the mentioned complex and compound system and its diverse mutual interactions must also be subject to more scrutiny and analysis with critical eyes.

The relation between the different mechanisms is not purely idealistic and might generate certain problems as a result of the different structures and principles governing each process. In this context, scholars expressed fears about the potential impact of litigation on mediation, such as the risk of the "lawyerization" of mediation as a mechanism known for its flexibility and informal nature.[46] Some experts predict that the increase in the different regulatory instruments might be a sign of overregulation, which could threaten the hard balance between mediation's main features and the need for legal certainty.[47]

The same applies to forms of interaction between arbitration and mediation. Hybrid procedures might be a perfect example of the fears expressed concerning the level of independence and impartiality of the same neutral hybrid procedures.[48] This mixed type poses many problems in ensuring that both procedures, if used together, still reflect the core guiding principles, such as the impartiality of the neutral third party.

Some amendments to the legal framework of international dispute resolution might also be required to reduce the risks associated with the various and increasing interactions.

Conclusion

Mediation as an ADR perfectly reflects this transformation and, somehow, through its emerging and developing legal and institutional environment, is

[46] Giovanni Matteucci, "The Singapore Convention on Mediation, challenges and opportunities," (Seminar Paper, the 2nd KIMC International Seminar, December 3, 2021), 9, https://www.academia.edu/download/88796956/The_Singapore_Convention_on_Mediation_challeng_The_2nd_KIMC_International_Seminar_Seoul_3.12.2021.pdf

[47] Delcy Lagones De Anglin, "Is Over-Regulation Killing Arbitration and Will It Kill Mediation?" in Trade Development through Harmonization of Commercial Law, Hors Série Volume XIX (Victoria University of Wellington, Faculty of Law, 2015), 239–243, https://www.wgtn.ac.nz/law/research/publications/about-nzacl/publications/special-issues/hors-serie-volume-xvi,-2013/Lagones-de-Anglim.pdf.

[48] Grosu, "Hybrid Procedures," 298.

strengthening this connection between the components of the international commercial dispute resolution system.

The increasing regulatory instruments and institutional infrastructures related to international business mediation are, in most cases, directly referring to or indirectly recalling the question of control or assistance from other mechanisms such as arbitration or litigation, which is probably amending many procedural rules related to the functioning of dispute resolution mechanisms.

The interaction mentioned might be present and manifest in other fields; however, the movement toward the establishment of this "ecosystem" seems to be more obvious in the international business context.[49] Some experts have even suggested that to take these developments into account, it could be necessary to reform the laws that guarantee and regulate the right of access to justice.[50]

The author believes that access to justice and procedural law in general, especially rules connected to more dynamic fields such as international business, might need a specific understanding that goes beyond the classic structures that are centered around litigation. This should not be interpreted as an exclusion of the role of adjudicative methods; however, as a possible emergent complex system based on coexistence and cooperation rather than competition and exclusion.[51]

The system mentioned will probably pose many challenges arising from the diverse characteristics of its different components. Thus, lawmakers and the actors involved in the international dispute resolution field must pay significant attention to the best approaches that could guarantee the efficient functioning of this complex system without threatening the features of each process. This is vital, especially when considering that some mechanisms, such as litigation and arbitration, are in a relatively stronger position than others because of their well-established legal and institutional frameworks.

To conclude, it seems that the influence of mediation in the international business dispute resolution system became undeniable, even when acknowledging the low rates of the use of this mechanism compared to adjudicative methods. The weaknesses of the process also emphasize the need for cooperation with other mechanisms, which will obviously modify the classic understanding of access to justice.

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[49] Fach Gómez, "The role of mediation," 2.

[50] Fach Gómez, "The role of mediation," 3.

[51] Barona and Esplugues, "ADR Mechanisms," 37-40.

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МІЖНАРОДНЕ КОМЕРЦІЙНЕ ПОСЕРЕДНИЦТВО ТА РОЗВИТОК ПРАВА НА ДОСТУП ДО ПРАВОСУДДЯ

Анотація

Доступ до правосуддя є фундаментальним і конституційним правом та концепцією в більшості сучасних правових систем. Це право розглядається як запорука миру та процвітання в суспільстві завдяки забезпеченню поваги до верховенства права та прав з боку визначених структур та інституцій. Хоча переважаюче тлумачення цього права тісно пов'язане з судовою системою, здається, що відбуваються певні зміни в напрямку інтеграції інших інструментів та появи складної інституційної та регуляторної системи правосуддя. Випадок міжнародних господарських спорів, здається, заслуговує на вивчення, оскільки він відображає конкретні потреби та вимоги щодо індивідуального доступу до правосуддя в цій галузі. У цій статті ми спробуємо дослідити цей рух та зміну парадигм, зосередившись на потенційному впливі деяких механізмів, таких як медіація, на класичне розуміння доступу до правосуддя.

Ключові слова: *справедливість, міжнародний бізнес, медіація, розвиток, взаємодія*